No. 89-1322

In the Supreme Court of the United States

OCTOBER TERM, 1990

OKLAHOMA TAX COMMISSION, PETITIONER

v.

CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether a counterclaim for declaratory and injunctive relief asserted by petitioner Oklahoma Tax Commission against the respondent Citizen Band Potawatomi Indian Tribe is barred by tribal sovereign immunity.

2. Whether the holdings in *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); and *California State Bd. of Equalization* v. *Chemehuevi Indian Tribe*, 474 U.S. 9 (1985), that a State may tax the purchase of cigarettes by non-Indians at a store owned and operated by Indians on an Indian Reservation are inapplicable in Oklahoma because Oklahoma has not acquired jurisdiction over Indian country pursuant to Public Law 280, Pub. L. No. 83-280, 67 Stat. 588, as amended.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Respondent is a federally recognized Indian Tribe and is organized under the Oklahoma Indian Welfare Act, 25 U.S.C. 503. In 1867, a 30-square-mile reservation was established by Treaty for the Tribe in Oklahoma. Treaty of Feb. 27, 1867, United States-Pottawatomie Tribe, 15 Stat. 531. Under an 1890 Agreement, portions of the reservation were allotted to tribal members and the Tribe ceded the remainder to the United States. Act of Mar. 3, 1891, § 8, 26 Stat. 1016. The ceded lands were then opened to non-Indian settlement. Pet. App. A12-A13.

The 1890 Agreement provided that certain of the ceded lands would be retained by the United States as long as they were needed for Indian purposes. 26 Stat. 1017. Several such tracts, totalling approximately 280 acres, were conveyed by Congress to the Tribe

in 1960 and 1964. Act of Sept. 13, 1960, 74 Stat. 903; Act of Aug. 11, 1964, 78 Stat. 392. In 1976, the land was conveyed back to the United States, to be held in trust for the Tribe, so that it would qualify for federal loans and grants to develop the land for industrial or commercial purposes. Act of Jan. 2, 1975, 88 Stat. 1922; see S. Rep. No. 877, 93d Cong., 2d Sess. 2, 4 (1974); H.R. Rep. No. 1586, 93d Cong., 2d Sess. 2, 4 (1974). A convenience store subsequently was constructed on a portion of the land with federal funds administered by the Department of Housing and Urban Development. Pet. App. A13-A14.

2. Oklahoma levies an excise tax on cigarettes at a total rate of $2.30 per carton. Pet. 3; Okla. Stat. Ann. tit. 68 §§ 302 to 302-3 (Supp. 1990). The "impact of the tax" is expressly "declared to be on the vendee, user, consumer, or possessor of cigarettes," and when the tax is paid by another person, "such payment shall be considered as an advance payment and shall thereafter be added to the price of the cigarettes and recovered from the ultimate consumer or user." § 302. The tax must "be evidenced by stamps which shall be furnished by and purchased from the Tax Commission," *ibid.*, and the retailer must affix the stamps if the wholesaler has not done so. § 305(c)(1966). Oklahoma also levies a 4% sales tax on the sale of tangible personal property, including cigarettes. § 1354(1)(A). The sales tax "shall be paid by the consumer or user to the vendor," and the vendor must "collect from the consumer or user the full amount of the tax" and pay it to the Commission. §§ 1361(A), 1362(A).

If a taxpayer fails to pay either tax, the Commission must determine and assess the amount due. The recipient may protest the assessment within 30 days. If he fails to do so, or if his protest is rejected, the assessment becomes final, subject to review by the Oklahoma Supreme Court. When the assessment is filed with the court clerk, it has the same effect and may be executed in the same manner as the final judgment of a state court, and it constitutes a lien on any real estate of the taxpayer in the county. Okla. Stat. Ann. tit. 68 § 221 (Supp. 1990).

3. a. The Tribe sells cigarettes at its store without affixing the tax stamps required by state law and without collecting state

sales and excise taxes from either Indian or non-Indian customers. Pet. App. A17-A18. In February 1987, the Commission issued an assessment to the Chairman of the Tribal Business Committee for excise taxes allegedly due on sales of more than 6 million packs of cigarettes sold at the Tribe's store between December 1, 1982, and September 30, 1986. The amount of tax due was $1,108,413.90, and the assessment was for twice that amount, as provided by Okla Stat. Ann. tit. 68 § 305(c) (1966), plus interest and penalties, for a total of $2,691,470.70. Br. in Opp. App. A24-A26. The assessment rendered the Chairman personally liable for the entire amount due. Pet. App. A2.

The Tribe immediately instituted his action for an injunction barring the Commission and its agents "from entering [the Tribe's] Indian Country and from enforcing or attempting to enforce its regulatory and taxing authority to assess a cigarette tax against [the Tribe], [the Tribe's] officers, agents or employees." Br. in Opp. App. A6-A7. The Tribe stressed that it "ha[d] submitted itself to [the] Court's jurisdiction for the sole purpose of litigating the single issue of the state's jurisdiction to assess back taxes through the state administrative and legal process." Pltf. Opening Br. 7.

b. Soon after the suit was filed, the Commission withdrew its assessment against the Chairman and issued a new assessment for the same amount against the Tribe. Pet. App. A2, A23-A24. The Commission then filed a counterclaim against the Tribe pursuant to Fed. R. Civ. P. 13(a). It alleged that the Tribe's sale of cigarettes to the general public without payment of state taxes was inconsistent with *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); and *California State Bd. of Equalization* v. *Chemehuevi Indian Tribe*, 474 U.S. 9 (1985), which sustained the application of state taxes to non-Indian purchasers of cigarettes from Indian retailers on a Reservation. Br. in Opp. App. B5-B6. The Commission sought a declaratory judgment sustaining its right to tax the Tribe's sales and enforce its tax laws by assessments and injunctions, and an injunction barring the Tribe from selling cigarettes upon which

the state excise and sales taxes have not been collected and remitted. *Id.* at B6.

The Tribe moved to dismiss the counterclaim, arguing, inter alia, that it is barred by tribal sovereign immunity. The district court rejected the Tribe's sovereign immunity defense, on the ground that the "relief sought by the [Commission] is so intertwined with the relief sought by the [Tribe] that the counterclaim falls within the scope of waiver contained in the [Tribe's] complaint." Br. in Opp. App. C3. The court found this result analogous to the doctrine of equitable recoupment, under which a defendant may offset against the plaintiff's monetary claim an amount that the defendant would otherwise be barred from recovering. *Id.* at C3-C4; see also Pet. App. A21-A22.

c. In its final judgment and opinion, Pet. App. A9-A22, the district court first held that the land on which the tribal store is located is a reservation, and therefore "Indian country" under 18 U.S.C. 1151(a). The court reasoned that a formal designation of Indian lands as a "reservation" is not required and that it is sufficient if Congress intended to reserve the lands for a tribe and vest primary jurisdiction in the federal and tribal governments. The court found that test satisfied here, since the United States holds the land in trust in order to foster tribal economic development. Pet. App. A15-A16. The court therefore concluded that this case falls under the usual rules governing the application of state law on Indian reservations: although a State may " 'under certain circumstances' " assert authority over the activities of nonmembers on a reservation and in " 'exceptional circumstances' " may even assert jurisdiction over the activities of tribal members, "a per se rule has nevertheless been adopted with regard to taxation of on-reservation activities of tribal members." *Id.* at A18 (quoting *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 215 & n.17 (1987)).

Applying these principles, the court held that "the Tribe itself not only is exempt from payment of state sales tax[1] (such exemption is recognized and acknowledged by the defendants in

[1] We understand this and other references in the district court's opinions and orders to "sales" taxes to include the cigarette excise tax as well.

pleadings to this Court) but also is immune from liability for the instant assessment since payment of the tax falls not on the ultimate consumer but in this situation on the Tribe." Pet. App. A19. The court similarly held that "purchasers of cigarettes at the tribal store who are [tribal] members are exempt from payment of state sales tax." *Ibid.* (citing *Moe*, 425 U.S. at 480-481). On the other hand, because it found the legal incidence of the tax is on the purchaser, Pet. App. A18, the court held that under *Moe* and *Colville*, sales to nonmembers may be taxed and the State may impose on the Tribe an obligation to assist in collecting those taxes and to comply with state record-keeping requirements. *Id.* at A19-A21. The court entered declaratory relief, presumably on respondents' counterclaim, embodying the foregoing principles. *Id.* at A9-A10.

On the Tribe's claim for injunctive relief, the court ordered that "[the Commission and its agents] are immediately and permanently enjoined from assessing any state sales taxes against and/or collecting any state sales taxes from the [Tribe]" and "from collecting any state sales taxes on purchases by members of [the Tribe] at the Potawatomi Tribal Store." Pet. App. A10. However, the court denied "the [Tribe's] request for further permanent injunctive relief as to collection of state sales taxes on purchases by nonmembers." *Ibid.*

4. a. The court of appeals agreed with the Tribe's argument on appeal (C.A. Br. i, 10-20) that the Commission's counterclaim for declaratory relief is barred by sovereign immunity. Pet. App. A2-A5. It therefore did not reach the Tribe's alternative argument (C.A. Br. i, 20-36; Reply Br. 15-20) that the district court erred in declaring that the Tribe must aid the State in collecting state taxes on purchases of nonmembers. The court explained that "Indian tribes have sovereign immunity from suits to which they do not consent, subject to plenary control [by] Congress," and that "[t]he Supreme Court has held that an Indian tribe does not consent to suit on a counterclaim merely by filing as a plaintiff." Pet. App. A2 (citing *United States* v. *U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513 (1940)). It also held that the compulsory counterclaim requirement of Fed. R. Civ. P. 13(a) "cannot be viewed as a congressional waiver of the Tribe's im-

munity," because Rule 13(a) "is explicitly intended to require joinder of only those claims that might otherwise be brought separately." Pet. App. A4. Finally, the court rejected the district court's "recoupment" rationale for allowing the counterclaim, reasoning that recoupment is an equitable defense to a suit for money damages, and cannot in any event be used to obtain affirmative relief. *Ibid.*

b. On its appeal, the Commission challenged the injunction barring it from assessing taxes against or collecting taxes from the Tribe itself, and from collecting any taxes on purchases by tribal members. C.A. Br. 52-59. The court of appeals first agreed with the district court that the tract on which the tribal store is located is a "reservation," and therefore "Indian country," since it is within the boundaries of the Tribe's original reservation and is held by the United States in trust for the Tribe. Pet. App. A5-A6. Because the Tribe therefore "retain[s] sovereign powers" over the land, the court believed that "Oklahoma has no authority to tax the store's transactions unless Oklahoma has received an independent jurisdictional grant of authority from Congress." *Id.* at A7. The court found such authority lacking here. It distinguished this Court's decision in *Colville*, which sustained a State's power to tax on-reservation purchases by non-Indians, on the ground that the Tribe in *Colville* "had opted to come under state jurisdiction pursuant to [Public Law 280],"[2] while Oklahoma has not assumed jurisdiction under Public Law 280. *Ibid.* The court therefore held that "the district court improperly denied the [Tribe's] request to enjoin Oklahoma from collecting state sales tax on the [Tribe's] sales of cigarettes," and it remanded for entry of a permanent injunction to that effect even though the Tribe apparently had not challenged the district court's refusal to enjoin the Commission from collecting state taxes on sales to nonmembers. *Ibid.*

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[2] Pub. L. No. 83-280, 67 Stat. 588, as amended, 18 U.S.C. 1162, 25 U.S.C. 1321-1326 and 28 U.S.C. 1360.

DISCUSSION

This case has a confused procedural history, and it is not clear precisely what relief the Tribe requested and the court of appeals and district court granted. The question whether the Court should grant review is further complicated by the wide-ranging nature of the Commission's submission, which mixes together *substantive* issues concerning the Tribe's governmental authority and its asserted exemption from state tax laws on the one hand, and *procedural* issues concerning the Tribe's sovereign immunity to suit and other enforcement measures the State might take to ensure collection of its taxes on the other hand. See Pet. 11-17.

In these circumstances, we think it best to focus on the two principal legal issues the court of appeals actually decided. First, the court held that the Commission's state-law counterclaim for declaratory relief is barred by tribal sovereign immunity. That ruling is correct, is consistent with (indeed compelled by) a number of decisions of this Court, and does not conflict with any decision of another court of appeals. It therefore does not warrant review by this Court.

Second, the court held that the Tribe is entitled to seemingly broad injunctive relief barring the Commission from collecting state taxes on *any* of its sales of cigarettes, whether to Indians or non-Indians. The court distinguished *Colville*, which sustained a state tax on sales to nonmembers, solely on the ground that the State there had acquired jurisdiction over the reservation under Public Law 280, while in this case Oklahoma has not done so. This attempted distinction of *Colville* is clearly wrong. We do not believe, however, that this issue warrants plenary review. Rather, we suggest that the Court grant the certiorari petition insofar as it challenges the portion of the judgment that addresses the Tribe's claim for injunctive relief, summarily vacate that portion of the judgment because it is premised on the court's erroneous view of *Colville*, and remand for further proceedings on the question of injunctive relief.

1. The court of appeals correctly held that the Commission's counterclaim is barred by the Tribe's sovereign immunity. See Pet. App. A3-A5. As this Court stated in *Santa Clara Pueblo*

v. *Martinez*, 436 U.S. 49, 58 (1978): "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. *Turner* v. *United States*, 248 U.S. 354, 358 (1919); *United States* v. *U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513 (1940); *Puyallup Tribe* v. *Washington Dep't of Game*, 433 U.S. 165, 172-173 (1977)." See also *Thebo* v. *Choctaw Tribe*, 66 F. 372, 374-376 (8th Cir. 1895); *Bottomly* v. *Passamaquoddy Tribe*, 599 F.2d 1061, 1064-1067 (1st Cir. 1979). The Court reaffirmed this rule in *Three Affiliated Tribes* v. *Wold Engineering*, 476 U.S. 877 (1986), holding that a State may not condition an Indian Tribe's access to state courts on the Tribe's waiver of its sovereign immunity to all civil causes of action, because such a condition would "invite[ ] a potentially severe impairment of the authority of the tribal government, its courts, and its laws." *Id.* at 890-891.

The immunity of Indian Tribes to suit finds its roots in the status of the Tribes as "domestic dependent nations," *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), which even today exercise inherent sovereign authority over their members and territory. See *Duro* v. *Reina*, 110 S. Ct. 2053, 2060-2061 (1990); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982). Thus, tribal sovereign immunity is "a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes II*, 476 U.S. at 890; see also *U.S. Fidelity & Guaranty Co.*, 309 U.S. at 512 & n.10; *United States* v. *Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981). This immunity now also finds strong support in Congress's statutory policy of promoting the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *Cabazon*, 480 U.S. at 216 (quoting *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 334-335 (1983)). If Indian Tribes were exposed to suits without their consent, scarce tribal resources would be devoted to litigation and be exposed to adverse money judgments that could deprive the Tribe of its ability to furnish necessary services to its members. Cf. *Santa Clara Pueblo*, 436 U.S. at 64-65 & n.19, 67 (discussing financial impact on Tribes that would result from

implied rights of action against tribal officers under Indian Civil Rights Act, 25 U.S.C. 1301 *et seq.*).[3]

"This [immunity] aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress," and Congress therefore may authorize suits against Indian Tribes. *Santa Clara Pueblo*, 436 U.S. at 58. But any such waiver of the Tribe's sovereign immunity by Congress may not be implied; it must be unequivocally expressed. *Ibid.* The Commission does not suggest that Congress has enacted a law authorizing it to sue the Tribe for the amount of taxes allegedly due on past transactions or for declaratory and injunctive relief regarding the application of the State's tax laws. Moreover, although we may assume that a Tribe may waive its sovereign immunity to suit if the requisite consent is clearly stated,[4] the Commission points to no such waiver here.

Nor is the bar of sovereign immunity lifted because the Commission here sought relief in a counterclaim under Fed. R. Civ. P. 13(a), rather than in a direct action against the Tribe. The Commission does not suggest that the Tribe *intended* its initiation of the suit to constitute consent to the Commission's broad counterclaims.[5] There likewise is no basis for concluding that the filing of the suit abrogated the Tribe's sovereign immunity by operation of law.[6] In *U.S. Fidelity & Guaranty Co.*, this Court

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[3] See *Adams* v. *Murphy*, 165 F. 304, 308-309 (8th Cir. 1908) (exemption of Indian tribes from civil suit "has been the settled doctrine of the government from the beginning"; "[i]f any other course were adopted, the tribes would soon be overwhelmed with civil litigation and judgments."). Accord *Thebo* v. *Choctaw Tribe*, 66 F. at 376.

[4] See, *e.g.*, *Puyallup Tribe* v. *Washington Game Dep't*, 433 U.S. 165, 170 (1977); *Turner* v. *United States*, 248 U.S. 354, 358 (1919); *McClendon* v. *United States*, 885 F.2d 627, 630-631 (9th Cir. 1989); *Merrion* v. *Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980), aff'd, 455 U.S. 130 (1982); *United States* v. *Oregon*, 657 F.2d at 1015.

[5] See Br. in Opp. App. A2 (complaint) ("Plaintiff submits to this Court's jurisdiction for the limited purpose of securing the equitable relief prayed for herein."). Compare *United States* v. *Oregon*, 657 F.2d at 1015; *Wichita & Affiliated Tribes* v. *Hodel*, 788 F.2d 765, 772-773 (D.C. Cir. 1986).

[6] Fed. R. Civ. P. 13 does not purport to dispense with a Tribe's sovereign immunity. See Advisory Committee Note 5 to Rule 13 (counterclaim pro-

held that sovereign immunity barred a cross-claim against a Tribe, because "[t]he desirability for complete settlement of all issues between parties must * * * yield to the principle of immunity." 309 U.S. at 512-513.[7] Other courts, like the court below, Pet. App. A3-A4, have adhered to this rule in the specific context of a counterclaim filed in response to an action brought by a Tribe to prevent application of state taxes to on-reservation sales of cigarettes. See *Chemehuevi Indian Tribe* v. *California State Bd. of Equalization*, 757 F.2d 1047, 1053 (9th Cir. 1985) (quoted at Pet. App. A4), rev'd on other grounds, 474 U.S. 9 (1986); *Confederated Tribes of Colville Indian Reservation* v. *Washington*, 446 F. Supp. 1339, 1351 (E.D. Wash. 1978) (three-judge court), aff'd in part and rev'd in part on other grounds, 447 U.S. 134 (1980).[8]

The Commission does not challenge the Tenth Circuit's holding that its counterclaim for declaratory and injunctive relief is barred

visions subject to admonition in Fed. R. Civ. P. 82 that Rules not be construed to extend district courts' jurisdiction). Moreover, Fed. R. Civ. P. 13 was not enacted by Congress, and it therefore cannot overcome tribal immunity. See 28 U.S.C. 2072(b) (rules "shall not abridge, enlarge or modify any substantive right").

[7] Contrary to the Commission's contention (Pet. 12-13), tribal sovereign immunity was central to the Court's holding in *U.S. Fidelity & Guaranty Co.* The Court took note of "[t]he public policy which exempted the dependent as well as the dominant sovereignties from suit without consent," and the Court found the claim barred because "[i]t is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did." 309 U.S. at 512.

[8] The court below correctly rejected the district court's reliance on the doctrine of equitable recoupment as a basis for entertaining the Commission's counterclaim. See Pet. App. A4. Equitable recoupment is a defense to a suit for monetary relief that permits the defendant to offset the award in favor of the plaintiff by an amount the plaintiff owes to the defendant arising out of the same transaction. It is not a basis for awarding affirmative relief. See *United States* v. *Dalm*, 110 S. Ct. 1361 (1990); *U.S. Fidelity & Guaranty Co.*, 309 U.S. at 511 & n.6, (citing *Bull* v. *United States*, 295 U.S. 247 (1935)). In *Three Affiliated Tribes II*, the Court noted the Tribe's concession that the non-Indian defendant could assert a counterclaim arising out of the same transaction as a setoff or recoupment, but it declined to consider whether a counterclaim might also be used to fix the Tribe's affirmative liability. 476 U.S. at 891 & n.*.

if the same claim would be barred in a separate suit against the Tribe. Nor does the Commission argue that the Tenth Circuit's holding that its claim against the Tribe would be barred by tribal sovereign immunity in a separate action conflicts with this Court's precedents or with any decision of another court of appeals.[9] Review therefore is not warranted on the sovereign immunity issue.

Apparently recognizing that its counterclaim is barred under existing law, the Commission argues (Pet. 12, 16-17) that the Court should reconsider the doctrine of tribal sovereign immunity. As we have explained, however, the Court has repeatedly held that an Indian Tribe is absolutely immune from suit without its consent unless Congress dispenses with that immunity. Although Congress has occasionally authorized particular categories of suits against Tribes where it believed the public interest so required,[10]

[9] In a decision not cited by the Commission or the panel below, the Tenth Circuit previously held that the Indian Civil Rights Act dispensed with a Tribe's sovereign immunity to a damages action brought by a nonmember. *Dry Creek Lodge, Inc.* v. *Arapahoe & Shoshone Tribes*, 623 F.2d 682 (1980), cert. denied, 449 U.S. 1118 (1981). However, as we explain in our amicus brief (at 13-14) in response to the Court's invitation in *Puckett* v. *Native Village of Tyonek*, petition for cert. pending, No. 89-609, this ruling in *Dry Creek Lodge* was clearly incorrect and has been sharply limited by the Tenth Circuit in subsequent decisions. Our amicus brief in *Tyonek* therefore argues that the asserted conflict between the Ninth Circuit's decision in that case and the Tenth Circuit's decision in *Dry Creek Lodge* does not warrant a grant of certiorari in *Tyonek*. (We have furnished counsel for the parties in this case with a copy of our brief in *Tyonek*.) It follows *a fortiori* that *Dry Creek Lodge* does not warrant a grant of certiorari in this case, since any inconsistency between the two would represent only an intra-circuit conflict. *Wisniewski* v. *United States*, 353 U.S. 901 (1957). Moreover, this case arises under state law, not the Indian Civil Rights Act, and the *Dry Creek Lodge* panel's belief that Congress must have intended to afford a remedy for violations of that Act has no application here.

[10] *U.S. Fidelity & Guaranty Co.*, 309 U.S. at 509, 513 (special statutory authorization for cross-claims); *United States* v. *Gorham*, 165 U.S. 316 (1897) (discussing Indian Depredation Act of Mar. 3, 1891, ch. 538, 26 Stat. 851); see generally *Thebo* v. *Choctaw Tribe*, 66 F. at 373-374 & n.1; R. Strickland, *et al.*, *Felix S. Cohen's Handbook of Federal Indian Law* 324 (1982) [hereinafter *1982 Cohen*]. Cf. 25 U.S.C. 450f(c) (requiring carrier insuring Tribe under Indian Self-Determination Act to "waive any right it may have to raise as a defense the [tribe's] sovereign immunity * * * from suit").

it has not enacted any general abrogation of tribal sovereign immunity. To the contrary, in the Indian Self-Determination Act, which establishes the framework for federal financial support of tribal governments in furtherance of the goals of tribal economic independence and self-government, Congress expressly provided that nothing in the Act shall be construed as "affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe." 25 U.S.C. 450n.[11] Because Congress thus has endorsed and acted upon the long-established principle that Indian Tribes are immune from suit, there is no occasion for this Court to reexamine its own precedents affirming that principle.

This case would not in any event present a suitable occasion for reexamination of tribal sovereign immunity. The Commission does not invoke any rights conferred on it by an Act of Congress. Compare *Santa Clara Pueblo*, *supra*. Its counterclaim arises under *state* law.[12] In light of the Court's repeated holdings that

[11] In the Indian Reorganization Act, Congress authorized Tribes both to adopt a constitution for the conduct of their governments (§ 16, 25 U.S.C. 476) and to receive a separate charter of incorporation to enable them to engage in business activities through a separate entity (§ 17, 25 U.S.C. 477). The principal reason for the latter authorization was the concern that non-Indian entities would not enter into commercial dealings with the tribal government because of its tribal immunity. Charters issued under Section 17 of the IRA often contain a clause allowing the corporation to sue or be sued, but this waiver is limited to the business dealings and assets under the control of that corporation, and is not intended to extend to the Tribe's activities in its sovereign capacity, as organized under Section 16 of the IRA. See *1982 Cohen* 325-326.

[12] In *Oklahoma Tax Comm'n* v. *Graham*, 109 S. Ct. 1519 (1989), the Court held that the Commission's suit against the Chickasaw Nation and the manager of a tribal enterprise to collect unpaid state cigarette taxes was one arising under state, not federal law, and therefore could not be removed to federal district court. After the *Graham* case was remanded back to the state courts following this Court's jurisdictional ruling, the trial court dismissed the case, finding it barred by tribal sovereign immunity. *Oklahoma ex rel. Oklahoma Tax Comm'n* v. *Graham*, No. C-85-223 (Dist. Ct. Murray Cty July 18, 1989). The Commission's appeal of that dismissal has been briefed and is pending before the Oklahoma Supreme Court (No. 73,729).

In *Oklahoma ex rel. May* v. *Seneca-Cayuga Tribe*, 711 P.2d 77, 83-84 (1985), cited by the Commission (Pet. 10-11), the Oklahoma Supreme Court held that

only Congress may dispense with a Tribe's sovereign immunity, the Court should not undertake to do so itself where Congress has not even enacted a substantive rule of conduct to which the abrogation of sovereign immunity from suit might be tied. See *Three Affiliated Tribes II*, 476 U.S. at 891 ("in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States").[13]

2. Although the court of appeals correctly ordered dismissal of the Commission's counterclaim, its treatment of the Tribe's request for injunctive relief was clearly wrong. The proceedings in the courts below on this issue are somewhat confused. As we have pointed out (see page 3, *supra*), the Tribe's claim for injunctive relief appears initially to have been limited to preventing the Commission and its agents from assessing *past* taxes

sovereign immunity did not bar a declaratory judgment action by the State against a tribe concerning the legality of its bingo operations. However, that Court erroneously relied on the balancing approach applied by this Court in determining whether state law or jurisdiction may extend to reservation activities, rather than the absolute rule, consistently followed by this Court, that the tribe itself is immune from suit. The Tenth Circuit subsquently affirmed a preliminary injunction barring further state-court proceedings in *Seneca-Cayuga*, in part because of the Oklahoma Supreme Court's clear error on the sovereign immunity issue. *Seneca-Cayuga Tribe* v. *Oklahoma ex rel. Thompson*, 874 F.2d 709, 714-716 (10th Cir. 1989).

In its brief on the Commission's appeal in the *Graham* case, *supra*, the Chickasaw Nation argues (as the state trial court held) that the Oklahoma Supreme Court should not follow its *Seneca-Cayuga* decision in light of this Court's intervening decision in *Three Affiliated Tribes II*, which makes clear that an Indian Tribe is immune from suit in state court absent federal authorization. 476 U.S. at 890-891. Especially in view of the pending appeal in the *Graham* case, the Oklahoma Supreme Court's prior decision in *Seneca-Cayuga* does not warrant a grant of certiorari on the sovereign immunity issue in this case.

[13] The Commission relies (Pet. 16-17) on *Santa Clara Pueblo* for the proposition that immunity might be limited to suits involving "internal" tribal affairs. But one of the plaintiffs who challenged the Tribe's membership policy in that case was a nonmember child. Nonmember claimants also were involved in *U.S. Fidelity & Guaranty Co.*, *Puyallup* and *Three Affiliated Tribes II*. Moreover, contrary to the Commission's contention (Pet. 16), the immunity of the Tribe in *Puyallup* extended to off-reservation fishing rights. See 433 U.S. at 167, 171; see also note 16, *infra*.

against the Tribe itself and taking steps to enforce that assessment. See also Br. in Opp. 5-6. The district court's judgment, however, not only granted that relief; it also enjoined the Commission "from collecting any state sales taxes on purchases by members of the [Tribe]" and, in light of *Colville*, denied the Tribe's "request" for "further permanent injunctive relief as to collection of state sales taxes on purchases by nonmembers." Pet. App. A10. The latter portions of the judgment seem to be concerned with collection of state taxes on future as well as past sales.

What is more, although the Tribe, on appeal, apparently did not challenge the denial of injunctive relief barring collection of taxes on sales to nonmembers, the court of appeals proceeded to decide that question: it held that "Oklahoma has no authority to tax the store's transactions," distinguishing *Colville* (which sustained the State's right to tax purchases by nonmembers) on the ground that Oklahoma, unlike the State of Washington in *Colville*, has not assumed jurisdiction under Public Law 280. Pet. App. A7. The court therefore concluded that the district court improperly denied the Tribe's "request" to "enjoin Oklahoma from collecting state sales tax on the [Tribe's] sales of cigarettes" (presumably including future sales to nonmembers), and it remanded for entry of such an injunction. *Ibid.*

Whether or not the district court was correct in believing that the Tribe had "request[ed]" injunctive relief barring collection of state taxes on purchases by nonmembers, there is substantial reason to doubt that the court of appeals had that question before it. But contrary to the Tribe's suggestion (Br. in Opp. 8), we do not believe the court of appeals' discussion of *Colville* can be dismissed as "dicta" and "not dispositive in reversing the district court." As we read the opinion below, the court of appeals did reach the merits of this issue (whether or not it should have done so), and its discussion of *Colville* was an essential and indeed the *only* basis on which the court of appeals reversed the district court's refusal to award broader injunctive relief.[14] On this point, the court below was plainly mistaken.

[14] The new final judgment entered by the district court on remand on January 4, 1990, further confuses the procedural posture of the case. See Br. in Opp. App. D1-D10. That judgment appears to incorporate in its conclusions of law the court of appeals' ruling that Oklahoma's failure to assume jurisdiction under Public Law 280 renders *Colville* inapplicable here. *Id.* at D7-D8. But as relief, the judgment only enjoins the Commission "from assessing any state sales taxes against and/or collecting any state sales taxes from the [Tribe]," "entering the Tribe's Indian Country," and "enforcing or attempting to enforce its regulatory and taxing authority to assess a cigarette tax against the Tribe, the Tribe's officers, agents or employees." *Id.* at D10. It does not in terms enjoin future collection of taxes on purchases by nonmembers where the Commission does not resort to such measures against the Tribe. However, if the court of appeals' judgment were permitted to stand, the Tribe might rely on that judgment in seeking broader relief in this or some other case.

This Court has thrice held—in *Moe*, *Colville* and *Chemehuevi*—that where the legal incidence of a state cigarette tax is on the purchaser, a State may impose that tax on purchases by nonmembers from a tribal store on an Indian reservation and may require the Tribe to collect the tax on its behalf. 425 U.S. at 481-483; 447 U.S. at 151, 159; 474 U.S. at 11-12. The district court in this case held that the legal incidence of the state tax is on the customer. Pet. App. A18. Neither the court of appeals nor the Tribe has questioned that ruling, which in any event seems compelled by the text of the Oklahoma statutes (quoted at page 2, *supra*). *Moe*, *Colville* and *Chemehuevi* therefore are controlling here and permit Oklahoma to impose its tax on cigarette purchases by nonmembers and to obligate the Tribe to collect the tax on its behalf.

It is true that the particular reservations involved in *Moe*, *Colville* and *Chemehuevi* had been brought under the civil jurisdiction of the State pursuant to Public Law 280. But contrary to the court of appeals' assertion, in none of the three cases (including *Colville*) did the Court's holding depend on that fact. And with good reason. Public Law 280 permits a State to assume jurisdiction over "civil causes of action" in Indian country to which Indians are parties, and provides that the "civil laws" of the State that are of general application to private persons and property shall then apply in Indian country. 25 U.S.C. 1322(a), 28 U.S.C. 1360(a). In *Bryan* v. *Itasca County*, 426 U.S. 373 (1976), the Court held that these provisions of Public Law 280 only permit state courts to adjudicate disputes involving Indians and to apply state

law in deciding such cases, and do not confer authority on a State to extend the full range of its regulatory authority, including taxation, over Indians and Indian reservations. See also *Rice* v. *Rehner*, 463 U.S. 713, 734 n.18 (1983) (civil jurisdiction conferred on a State by Public Law 280 "does not include regulatory jurisdiction to tax"); *Cabazon*, 480 U.S. at 208, 210 n.8 (same).

Indeed, the Tribe's notion (Br. in Opp. 8) that the ruling in *Colville* may be explained by Public Law 280 is refuted by the discussion of *Bryan* v. *Itasca County* in *Colville* itself (447 U.S. at 142 n.8):

> Initially the State [of Washington] asserted [in the district court] that it could tax all tribal cigarette sales, regardless of whether the buyer was Indian or non-Indian. Its theory was that Pub. L. 280, 67 Stat. 588, granted it general authority to tax reservation Indians. After this theory was rejected in *Bryan* v. *Itasca County*, *supra*, the State abandoned any claim of authority to tax sales to tribal members. 446 F. Supp., at 1346, n. 4.

In light of the Court's acceptance of Washington's concession, there simply is no basis for contending that the same grant of civil jurisdiction under Public Law 280 was the essential (yet unspoken) basis for the Court's holding that the State could tax *nonmembers*.

Moreover, in *Moe*, Montana's assumption of civil jurisdiction over the Flathead Reservation under Public Law 280 was limited to particular subject matters, and the district court had held that "the power to impose cigarette and licensing taxes is *not* among the categories of assumed civil jurisdiction." *Confederated Salish & Kootenai Tribes* v. *Moe*, 392 F. Supp. 1297, 1306 (D. Mont. 1975) (three-judge court) (emphasis added). Public Law 280 therefore could not have been the basis for this Court's holding that Montana could tax sales to nonmembers. See also *Cotton Petroleum Corp.* v. *New Mexico*, 110 S. Ct. 1698 (1989) (sustaining application of state tax to on-reservation activities of non-Indian in New Mexico, which has not assumed jurisdiction under Public Law 280).

Because the States' authority to tax cigarette purchases by nonmembers in *Moe*, *Colville* and *Chemehuevi* was not acquired pursuant to—but rather existed independently of—Public Law 280, it follows that Oklahoma's power to tax cigarette purchases by nonmembers at the Tribe's store likewise exists independently of Public Law 280 and that Oklahoma's failure to acquire civil jurisdiction under Public Law 280 therefore does not foreclose it from exercising that power. In our view, the court of appeals' contrary conclusion on this issue is so clearly wrong that a summary disposition would be appropriate. We accordingly suggest that the Court grant the petition, summarily vacate the portion of the judgment below that addresses the Tribe's request for injunctive relief because it rests on the court of appeals' erroneous view of *Colville* (and *Moe* and *Chemehuevi*), and remand to the court of appeals for further consideration on the question of injunctive relief. The Court disposed of the petition in *Chemehuevi* in the same manner: the Court there summarily reversed the Ninth Circuit's holding that the State could not tax nonmembers, but it did not grant review of the Ninth Circuit's holding that the State's counterclaim was barred by tribal sovereign immunity. See 474 U.S. at 10, 12; 85-130 Pet. at i, 8-10.

If the Court disposes of the petition in the manner we suggest, it will furnish an opportunity for the court of appeals to clarify what other issues were presented and preserved below. Moreover, because the court of appeals held that all transactions at the Tribe's store are exempt from state taxation, it had no occasion to consider what measures the Commission might lawfully take to enforce its tax laws if those laws *do* apply to at least some sales of cigarettes (those to nonmembers). Nor is it clear what enforcement measures the State would propose to take. The court of appeals should be given an opportunity to address these matters in the first instance. Compare *Colville*, 447 U.S. at 162 (declining to consider legality of possible enforcement measures). Indeed, because a summary disposition by this Court would disabuse the Tribe of the notion that the rule of *Moe*, *Colville* and *Chemehuevi* is inapplicable to cigarette sales at its store, the Tribe might be given a reasonable opportunity, following a remand, to assume its obligation to assist the Commission in col-

lecting state excise taxes on sales to nonmembers. If the Tribe does so, the matter of future enforcement measures need never be addressed.[15]

[15] The Commission also contends (Pet. 8-9) that cigarette sales at the tribal store (apparently including even those to tribal members) are subject to taxation because the tribal trust land on which the store is located is not the sort of land to which the usual rules of state and tribal jurisdiction under *Colville* and similar cases apply. Contrary to the Commission's view, the court of appeals' holding on this point is a reasonable application of the Court's description of a reservation in *United States* v. *John*, 437 U.S. 634, 649 (1978), as land that has "been validly set apart for the use of the Indians as such, under the superintendence of the Government." See Pet. App. A5-A6. The Court denied review in another case in which the Oklahoma Tax Commission challenged an essentially identical ruling by the Tenth Circuit regarding tribal property in Oklahoma. See *Indian Country, U.S.A., Inc.* v. *Oklahoma*, 829 F.2d 967, 973 (1987), cert. denied, 487 U.S. 1218 (1988). Because the panel below followed *Indian Country, U.S.A.*, there is no reason for a different result here. See also 25 U.S.C. 2719(a)(2) (applying Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et seq.*, which was enacted after the denial of certiorari in *Indian Country, U.S.A.*, to Indian lands in Oklahoma).

Because this issue is essentially confined to Oklahoma (in light of the unique history of its reservations), it also is significant that the Tenth Circuit's decisions are consistent with decisions of the Oklahoma Supreme Court in somewhat analogous circumstances. See *Seneca-Cayuga*, 711 P.2d at 79-83; *Enterprise Management Consultants, Inc.* v. *Oklahoma Tax Comm'n*, 768 P.2d 359, 363 n.16 (1988) (bingo on Potawatomi tribal land); *id.* at 366 (Kauger, J., concurring); *Housing Auth.* v. *Harjo*, 790 P.2d 1098 (Okla. 1990). (However, for the reasons stated in our amicus brief in support of the certiorari petition in *Oklahoma* v. *Brooks*, cert. denied, 109 S. Ct. 1769 (1989), we believe that special statutes applicable to the former territories of the Five Civilized Tribes in eastern Oklahoma transferred criminal and civil adjudicatory jurisdiction over Indian Country in those areas to the State.)

CONCLUSION

The petition for a writ of certiorari should be granted insofar as petitioner seeks review of that portion of the judgment of the court of appeals addressing the Tribe's request for injunctive relief, that portion of the judgment should be summarily vacated for the reasons stated in point 2 of this brief, and the case should be remanded to the court of appeals for further consideration of the Tribe's request for injunctive relief. The petition for a writ of certiorari should be denied insofar has it seeks review of the portion of the judgment below that directs dismissal of the Commission's counterclaim on sovereign immunity grounds.

Respectfully submitted.

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